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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| ASIA AWAD,<br><br>Plaintiff,<br><br>v.<br><br>LIBERTY MUTUAL FIRE INSURANCE COMPANY, RAAD KHALAF and DOES 1-30, inclusive,,<br><br>Defendant. | Case No. 08-CV-00696-JM-AJB<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT RAAD KHALAF'S 12(B)(6) MOTION**<br><br>Date: June 6, 2008<br>Time: 1:30 p.m.<br>Court: 16<br>Judge: Judge Jeffrey T. Miller<br>Complaint Filed: 4/16/08<br>Trial Date: None set |

**I.**

**INTRODUCTION**

Plaintiff Asia Awad ("AWAD") has filed a claim against Defendant Raad Khalaf ("KHALAF") that is untenable as a matter of law. KHALAF is and was at all times relevant to the complainant agent of Defendant, Liberty Mutual Fire Insurance Company ("LMFIC"), and cannot be held individually liable for the claims asserted in AWAD's Complaint. Because the claims against KHALAF are untenable as a matter of law, this court should dismiss the negligence claim against KHALAF pursuant to Federal Rule of Civil Procedure 12(b)(6).

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## II.

## STATEMENT OF FACTS

This action is based on a dispute between AWAD and LMFIC concerning insurance policy benefits arising from a theft loss that allegedly occurred at AWAD's property. LMFIC denied insurance coverage for the property that was allegedly stolen.

AWAD's Complaint names LMFIC and KHALAF as defendants. The claims against LMFIC are for breach of insurance contract and breach of covenant of good faith and fair dealing. The only claim against KHALAF is for negligence.

AWAD's Complaint alleges that KHALAF was an insurance agent for LMFIC and was the agent that AWAD used in the procurement of the insurance policy that allegedly covered the stolen property. (Complaint, ¶¶ 2, 15–17, *see*, *also*, declarations page of LMFIC policy attached as Exhibit "A" to Complaint.) All of AWAD's allegations against KHALAF relate solely to KHALAF's activities as an LMFIC agent relative to the procurement of AWAD's policy of insurance. (Complaint, ¶¶ 15–21.) The Complaint admits that KHALAF procured the requested coverage for AWAD's jewelry in the amount of $159,300 (*See*, Complaint, Exhibit "A" and declarations page attached thereto.). At the same time, AWAD alleges that, despite obtaining the coverage, KHALAF advised LMFIC that he did not believe that AWAD had the jewelry that was to be endorsed onto the policy. (Complaint, ¶¶ 15–21.) Based on these allegations, AWAD has failed to state a claim upon which relief can be granted.

## III.

## LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss will be granted when the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Rule 12(b)(6) permits dismissal of a claim either where the claim lacks a cognizable legal theory or where insufficient facts are alleged to support the plaintiff's theory. See *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a Rule 12(b)(6) motion a

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complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). A plaintiff's obligation under Rule 8(a)(2)'s notice pleading standard is "to provide the grounds of his entitlement to relief [using] more than labels and conclusions. . . ." *Id.* In resolving a Rule 12(b)(6) motion, the court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court is not required to credit "conclusory allegations of law and unwarranted inferences." *Jet Source Charter, Inc. v. Gemini Air Group, Inc.*, 2007 U.S. Dist. LEXIS 85308, 4-6 (SD Cal. 2007).

## IV.

## ARGUMENT

AWAD's claims against KHALAF must be dismissed because California courts have long held that an insurer's employees and agents are not individually liable for alleged wrongful conduct while executing their employment obligations.

*Lippert v. Bailey*, 241 Cal.App.2d 376 (1966) sets forth the well established rule that acts of an insurance agent within the course and scope of his employment for the insurer are not actionable against the agent individually. *Id.* at 382-383. AWAD's Complaint clearly alleges that KHALAF was acting as an agent and employee of LMFIC. (Complaint, ¶ 2.) Further, the declarations page of the LMFIC policy that AWAD attached to her Complaint clearly lists KHALAF as an agent of LMFIC. (*See* Complaint, Exhibit "A" and declarations page attached thereto.) Therefore, there can be no real dispute that KHALAF was acting as an agent of LMFIC at the time he procured the insurance policy for AWAD.

The only conceivable scenario where KHALAF can be individually liable would be one where KHALAF was acting as a "dual agent." He was not and the dual agent exception to the general rule does not apply. The court in *Mercado v. Allstate Ins. Co.*, 340 F.3d 824 (9th Cir. 2003) characterized the dual agent exception to the general rule.

Dual agency is only present where the agent assumes special duties for the benefit of the insured beyond those required by its principal. *Id.* at 826 fn. 1.

AWAD has alleged no such duties in her Complaint. Rather, AWAD alleges that KHALAF agreed to assist her in "obtaining and applying for insurance coverages." (Complaint, ¶ 16.) AWAD also alleges that she sought advice from KHALAF "as to how to obtain the requested jewelry protection." (Complaint, ¶ 17.) It is based on these factual allegations that AWAD sets forth her conclusory allegation that KHALAF was acting as her agent. The factual allegations merely set forth KHALAF's normal duties as an agent of LMFIC. The court in *Charlin v. Allstate Ins. Co.*, 19 F.Supp.2d. 1137 (C.D. Cal. 1998) explained that where a plaintiff fails to allege facts showing that an agent acted beyond his capacity as an agent of the insurer, no dual agency can exist. *Id.* at 1141-1142. AWAD's conclusion that KHALAF acted as her agent is not supported by her factual allegations and, therefore, the conclusory allegation should be disregarded.

Further, *Good v. Prudential Ins. Co. of Am.*, 5 F.Supp.2d. 804 (N.D. Cal. 1998) clearly sets forth that there can be no dual agency unless the agent is "an independent broker or has a long-term, special relationship with the insured." *Id.* at 808. In *Good*, the plaintiff did not plead either. In fact, the plaintiff pled that "each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency." *Id.* (citing complaint). This court is presented with the same scenario in this case. AWAD has plead that KHALAF first assisted her in applying for and obtaining insurance coverages in November of 2005. (Complaint, ¶ 16.) This was less than one year prior to the alleged loss of jewelry that is the subject of this lawsuit. As such, this allegation cannot suffice to establish a long-term, special relationship between AWAD and KHALAF. Further, AWAD's complaint contains almost identical language as that cited by the District Court in *Good*: "defendants, and each of them, were the agents and employees of each of the remaining defendants, and were at all times acting within the purpose and scope of said agency and employment." (Complaint, ¶ 2.) Therefore, AWAD has pled that KHALAF

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was an employee of LMFIC and that he was acting within the scope of his employment. Because AWAD has plead no long-term special relationship, or that KHALAF was an independent broker, she cannot establish dual representation as a matter of law. *Good v. Prudential Ins. Co. of Am.*, *supra*, 5 F.Supp.2d. at 808.

Because all of KHALAF's actions were made within the purpose and scope of his agency and employment with LMFIC, and because KHALAF cannot be deemed a dual-agent based on AWAD's own allegations, AWAD has failed to state a claim for which relief can be granted and this lawsuit should be dismissed as to KHALAF.

## V.

## CONCLUSION

AWAD cannot state a claim for which relief can be granted. California law is clear on this point. Apparently KHALAF has been included as a defendant in this lawsuit for the sole purpose of defeating federal jurisdiction. Such an attempt is patently improper. Therefore, KHALAF respectfully requests that this court grant this motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6).

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DATED: May 2, 2008

By: /s/ Gregor A. Hensrude
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